BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

Petition of Wisconsin Public Service Corporation for Declaratory Ruling Regarding Right to Self-Supply Station Power to Fox Energy Center	))))	**Docket No. 6690-DR-109**

REPLY BRIEF OF WISCONSIN PUBLIC SERVICE CORPORATION

The Commission should confirm that WPSC[1] is entitled to remote self-supply station power to the Facility. KU's arguments to the contrary distort both the terms of the Agreement and the law governing it. Wisconsin law and Schedule 20 of the MISO Tariff grant WPSC the right to self-serve the Facility, and the Agreement does not affect this right. The Agreement expressly reserves the parties' right to self-service, which cannot be contracted away. Moreover, federal law guarantees WPSC's right to self-supply station power to the Facility over the interstate transmission grid, and this right cannot be restricted by state law.

ARGUMENT

I. THE COMMISSION SHOULD FIND THAT THE AGREEMENT RESERVES WPSC'S RIGHT TO PROVIDE ELECTRIC SERVICE TO ITS OWN FACILITY.

A. It is irrelevant that the parties did not agree in writing to an "exception" that would allow WPSC to serve the Facility.

Generally speaking, the Agreement establishes a boundary line that separates KU's retail electric service territory from WPSC's retail electric service territory. KU has the exclusive right to provide retail electric utility service to "customers" on the west side of the line, and WPSC has the exclusive right to provide retail electric utility service to "customers" on the east side of the line. (WPSC Petition, Exhibit 2, at 1–2) However, Section 5 of the Agreement

[1] Acronyms used in WPSC's initial brief are used herein.

allows the parties to agree to written exceptions to this general rule. (*Id.* at 2) KU argues that, because the parties did not agree in writing to an exception for the Facility, WPSC cannot serve the Facility without KU's consent. KU's argument is entirely without merit.

The Facility is not and never has been one of KU's "customers." KU therefore has no right under Section 2 of the Agreement to provide the Facility with electric service. The Facility is an inanimate object that can have no legally recognized relationship with KU. The Facility's owner—formerly Fox Energy Center, LLC, and now WPSC—is KU's customer. Moreover, as a public utility, WPSC has the right under Wisconsin law to provide electric service to its own facilities. Wis. Stat. § 196.495(3). Accordingly, there is no reason for the parties to have entered into a written agreement "excepting" the Facility from the scope of Section 2 because the Facility is not a "customer" within the meaning of that section.

KU argues that the Commission's decision in Docket No. 6680-DR-110—and the Court of Appeals' subsequent affirmance of that decision in *Wisconsin Power & Light Co. v. Pub. Serv. Comm'n of Wis.*, 2009 WI App 164, 322 Wis. 2d 501, 777 N.W.2d 106 ("*WP&L*")—forecloses WPSC's assertion that the Facility is not a "customer" within the meaning of the Agreement and Wis. Stat. § 196.495(4). Unfortunately, KU misrepresents the facts of that case and distorts the otherwise clear reasoning on which the outcome was based. Contrary to KU's misguided analysis, *WP&L* actually supports WPSC's argument that the Facility (or any other inanimate object) is not a "customer" within the meaning of the Agreement.

The *WP&L* case involved a dispute between Wisconsin Power & Light ("WP&L") and the Wisconsin Dells municipal electrical utility ("City Electric Utility") over which utility had the right to serve a new condominium complex. In adjudicating the dispute, the Commission had to apply Wis. Stat. § 196.495(1m)(b), which provides that, if two utilities are

competing to serve a new customer, and both utilities can reach the customer with a line of less than 500 feet, then the customer may choose the utility from which it will take service. *See WP&L*, 2009 WI App 164, ¶ 3 (citing *Adams-Marquette Electric Coop. v. Pub. Serv. Comm'n of Wis.*, 51 Wis. 2d 718, 731, 188 N.W.2d 515 (1971)). In such disputes, the Commission measures the length of the extension from the nearest existing local service distribution line "that is, or has been, actually used in rendering local service to a customer." Wis. Admin. Code PSC § 112.08(1) (emphasis added).

Both WP&L and the City Electric Utility had facilities within 500 feet of the condominiums, and the condominium developer elected to take service from the City Electric Utility. *See* Docket No. 6680-DR-110, *Final Decision*, at 5 (Jun. 6, 2007). In upholding the developer's election, the Commission calculated the distance from the condominiums to the City Electric Utility's closest existing distribution facilities, which were interconnected to facilities that were owned by the City and operated by its sewer and water utilities. *Id*. at 5-6, 21. The Commission and the Court of Appeals rejected WP&L's argument that, because the City owned both the City Electric Utility and the facilities, the utilities operating those facilities could not be considered "customers" of the City Electric Utility. *Id.* at 21–22; *WP&L*, 2009 WI App 164, ¶¶ 17, 23.

KU now claims that *WP&L* stands for the proposition that "a facility being served by its public utility owner under Wis. Stat. § 196.495(3) is a 'customer.'" (KU Initial Br., at 7) This is a gross misreading of the Commission's and the Court of Appeals' decisions. First and foremost, in its decision, the Commission explicitly stated that it was not addressing the issue of whether the facilities served by the City Electric Utility constituted a "property or facility" of a public utility under Wis. Stat. § 196.495(3). *See* Docket No. 6680-DR-110, at 21, n.6.

To the extent that the case is relevant to the current dispute, however, it cuts in favor of WPSC's position. *WP&L* and the underlying Commission decision were based on the premise that the entities that operated the facilities at issue—the City's sewer and water utilities—were the City Electric Utility's customers. Indeed, the Commission went to extraordinary lengths to determine whether the City Electric Utility treated its affiliated utilities as "customers," as opposed to simply treating the facility at issue as its own. Specifically, the Commission reopened the record, took additional evidence on the issue, and directed the City Treasurer to submit an affidavit "to demonstrate whether the City [Electric] Utility is billing the City Sewer Utility and City Water Utility as customers at tariffed rates for its provision of electric service, whether the City Sewer Utility and City Water Utility are paying those bills, and when billing and payments first occurred." Docket No. 6680-DR-110, *Final Decision*, at 21. The City Treasurer did so, and the City argued that, in providing electric service to the facilities, the City Electric Utility was serving a "customer" because:

> By law, a municipal utility cannot provide electric service to another utility of the city without charge. Doing so would result in an unlawful cross-subsidy and would violate the prohibition in Wis. Stat. § 196.37 against unlawful discrimination. Accordingly, the electric utility must treat the sewer or water utility as would any other customer of the electric utility.
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> Accordingly, it is unlawful for a municipal electric utility to provide electric service to a lift station or well and not charge the sewer utility or the water utility for that electricity. Thus, by law, the sewer utility or water utility receiving service is a customer of the electric utility.

Docket No. 6680-DR-110, *City of Wisconsin Dells' Brief on "Customer Issue"*, at 2-3 (May 7, 2007), PSC REF#:74799 (emphases added).

After an additional hearing, the Commission concluded that the City Electric Utility had properly billed its affiliated utilities for the electric service they received, that the City Electric Utility treated its affiliated utilities "the same as private customers," and that they were therefore "customers" of the City Electric Utility within the meaning of Wis. Admin. Code § PSC 112.08(1). Docket No. 6680-DR-110, *Final Decision*, at 21–22*; see also WP&L*, 2009 WI App 164, ¶ 23 ("Given the facts found by the PSC, its conclusion that the City water and sewer utilities were 'customers' within the meaning of the regulation is a reasonable construction and application of the regulation.").

Ultimately, *WP&L* and the underlying Commission decision stand for the proposition that a "customer" is an entity and not a facility. When a public utility provides service to a facility, the "customer" is the entity that owns or operates the facility. It is the entity, not the facility, that requests service from the public utility, chooses what kind of service to receive if such options exist (e.g., time-of-use or green energy), and receives and pays the bills for that service. When the entity sells the facility to a new owner, that entity remains responsible for the service provided prior to the sale, and the new owner must arrange for its own service from the public utility, including making service choices that may be different than the seller's. KU's position that the facility is the customer makes no sense, legally or factually.

B. Regardless of whether the parties waived other rights under Wis. Stat. § 196.495, WPSC's right to self-service under subsection (3) was not and cannot be waived.

KU argues that by entering into the Agreement, the parties waived a number of rights under Wis. Stat. § 196.495, including (1) the right to provide service to any unserved premises located on the other side of the boundary line, when the utility is the only one with distribution assets within 500 feet of the facility to be served on the premises; (2) WPSC's right

to extend service into areas annexed into the City of Kaukauna; (3) KU's right to acquire WPSC's facilities located in an area annexed by the City of Kaukauna; and (4) WPSC's right to self-serve the Facility. (KU Initial Br., at 8–10) Of course, WPSC's Petition raises only one issue—whether it has the right to self-serve the Facility under Wis. Stat. § 196.495(3) and Schedule 20 of the MISO Tariff. WPSC therefore takes no position on whether the parties waived the other rights that KU described, and urges the Commission to do the same. *See Jankee v. Clark County*, 235 Wis. 2d 700, 713 n.3 (1999) ("When resolution of one issue disposes of a case, we will not address additional issues.") Regardless of whether the Agreement waives the other rights identified by KU, the Agreement does not and cannot waive WPSC's right to serve its own Facility.

Even if other rights under Wis. Stat. § 196.495 were relevant, the Agreement does expressly address some of the statutory rights that KU asserts the parties have waived. For example, Section 8 explicitly addresses the parties' rights in the event the City of Kaukauna annexes new territory. (*See* Petition, Exhibit 2, at 2–3) That provision grants KU the right "to serve all existing and future customers within any area annexed to the City of Kaukauna after the execution of this Agreement, except for any then[-]existing customers of WPSC located to the east of the Boundary line." (*Id.*) As KU recognizes in its initial brief, this Section alters the parties' pre-existing statutory rights: it precludes KU from acquiring facilities that serve WPSC customers located in newly annexed areas (*see* Wis. Stat. § 196.495(2m)) and precludes WPSC from extending service into those newly annexed areas (*see* Wis. Stat. § 196.495(2)). Thus, to the extent the Agreement altered the parties' pre-existing, annexation-related rights, it does so by specifically addressing those rights and prescribing procedures that apply in the event of annexation. This is consistent with Section 10 of the Agreement—which states that the

Agreement does not affect the legal rights of either party "except as specifically set forth herein"—and Wisconsin law—which provides that waivers of statutory rights must be "clear and unambiguous." *Faust v. Ladysmith-Hawkins School Systems, Joint Dist. No. 1*, 88 Ws. 2d 525, 532–33, 277 N.W.2d 303, *on rehearing,* 88 Wis. 2d 525, 281 N.W.2d 611 (1979) (per curiam).

By contrast, the Agreement does not mention the parties' right of self-service under Wis. Stat. § 196.495. As WPSC noted in its initial brief (at 5–6), absent a specific waiver provision, Section 10 of the Agreement explicitly reserves this right. Moreover, WPSC's decision to exercise its right to self-service is not inconsistent with the Agreement, which by its very terms limits each party's right to serve "customers" on the opposite side of the Boundary Line. *See* Wis. Stat. § 196.495(4); Petition, Exhibit 2, at 1–2. Given these realities, the Agreement does not waive WPSC's right of self-service.

Indeed, the structure of Wis. Stat. § 196.495 indicates that the right of self-service is different from any other provision in that statute, and therefore cannot be waived. Broadly speaking, this statute sets forth "the standards for determining which utility has the right to serve a particular customer." *WP&L*, 2009 WI App 164, ¶ 3. For example, the statute forbids utilities from extending service to the premises of any person already receiving service from another utility. Wis. Stat. § 196.495(1m)(a). Likewise, utilities are permitted to enter into territorial agreements governing the right to serve customers. *Id.* § 196.495(4). As the title of the statute indicates, the "primary purpose" of establishing these rights and procedures is to avoid duplicating existing electrical service facilities. *See Adams-Marquette Electric Cooperative, Inc. v. Pub. Serv. Comm'n*, 51 Wis. 2d 718, 742, 188 N.W.2d 515, 527 (1971). This is because redundant facilities increase the cost of electrical service without providing any corresponding benefit to the consuming public.

By contrast, subsection (3) stands out because it does not prescribe standards for determining which utility can serve which customer. Rather, it provides that, regardless of the standards that would otherwise apply in a dispute over service to customers, the utility has the unrestricted right to serve its own facilities, no matter where they are located. *See* Wis. Stat. § 196.495(3) ("Nothing in this section shall preclude any public utility . . . from extending electric service to its own property or facilities . . . .") (emphasis added). In other words, even though a utility cannot extend service to the premises of a person already receiving service from another utility, and even though a utility may have entered into a territorial agreement precluding it from serving customers in a given geographic location, the utility retains the right to serve its own property and facilities.

The right of self-service serves the primary purpose of Chapter 196—to protect the consuming public. (*See* WPSC Initial Br., at 5) A utility can save its ratepayers money by using its own resources to provide station power. Indeed, in this case, WPSC stands to save its ratepayers approximately $775,000 annually by remote self-supplying station power to its Facility. (*See* Stipulated Facts, at 4, Exhibit 4) Given that this right serves such an important public policy purpose, it cannot be waived. *See Faust*, 88 Wis. 2d at 533. Accordingly, WPSC has the right to remote self-supply station power to its own Facility and the Agreement does not affect this right.

C. WPSC may self-supply station power to the Facility even if it is not providing retail electric service to the Facility.

KU argues that section 196.495(3) grants a public utility only "the right to provide retail electric service to its own property or facilities." (*See* KU Initial Br., at 12) (emphasis in original) This argument makes absolutely no sense and is based on a gross mischaracterization of the statute.

In arguing that a public utility only has the right to provide retail electric service to its own facilities, KU badly misquotes section 196.495(3). KU asserts that the statute reads as follows:

> Nothing in this section shall preclude any public utility . . . from extending electric service to its own property or facilities for resale. (KU Initial Br., at 12)

Convenient as this selective quotation may be for the purposes of KU's argument, that is not what the statute actually says:

> Nothing in this section shall preclude any public utility or any cooperative association from extending electric service to its own property or facilities or to another cooperative association for resale.

Wis. Stat. § 196.495(3) (emphasis added). Thus, the reference to the "resale" of electric service applies only when a cooperative extends service "to another cooperative association." It does not modify or otherwise limit the public utility's (or the cooperative's) right to serve its own facilities. In other words, the utility need not actually sell electricity to itself to invoke the right to self-service.

KU's interpretation makes no sense because, as FERC has noted, "when a generator self-supplies its station power requirements . . . there is no sale, whether for end use or otherwise." *PJM Interconnection, LLC*, 94 FERC ¶ 61251, at 61,891 (2001) ("*PJM II*"). If self-supplying station power involves no sale, then it would make little sense for Wisconsin law to limit a utility's right of self-service to instances in which the utility provides retail service to its own facilities. Properly understood, Wis. Stat. § 196.495(3) preserves a public utility's right to serve itself.

II. STATE LAW CANNOT RESTRICT WPSC'S RIGHT UNDER THE MISO TARIFF TO SELF-SERVE THE FACILITY OVER THE INTERSTATE TRANSMISSION NETWORK.

The Commission does not reach the question of whether the self-service provisions of MISO's federally approved tariff preempt Wisconsin law unless the Commission rules that the Agreement, entered into and approved under Wisconsin law, interferes with WPSC's self-service rights. If the Commission so concludes, then the MISO Tariff preempts the Agreement because the Agreement would deprive WPSC of its federal law right to use the transmission system to remote self-supply station power to the Facility.

A. The Agreement does not waive WPSC's federal right to remote self-supply station power to the Facility.

KU's argument would interpret the Agreement to waive WPSC's federal right to remote self-supply station power to the Facility. But as WPSC noted in its initial brief (at 9), the Agreement is fundamentally concerned with the parties right to provide retail electric service. *See* Wis. Stat. § 196.495(4) (allowing public utilities to enter into territorial agreements governing "the right to serve customers"); Petition, Exhibit 2, at 1 (noting that the parties desired to enter into the Agreement "to allow each Party to extend its distribution system and provide electric utility service" in certain portions of the state of Wisconsin). It would be absurd to interpret an Agreement that is fundamentally concerned with the provision of retail electric service to constitute a waiver of a federal right.

Moreover, the Agreement does not even address the issue of self-service, and therefore could not waive the parties' federal right to self-supply station power over the interstate transmission grid. FERC has held that waivers of statutory rights held under the Federal Power Act "will not be inferred from doubtful or equivocal acts or language" and "must be stated explicitly." *See Sithe/Independence Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 76

FERC ¶ 61,285, at 62,458 (1996). This is consistent with federal law generally, which requires that waivers of statutory rights be clear and unambiguous. *See, e.g.*, *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 81 (1998) (union-negotiated waiver of employees' statutory right to sue in federal court for employment discrimination must be clear and unmistakable); *United States v. Jones*, 381 F.3d 615, 619 (7th Cir. 2004) (noting that a defendant can waive both statutory and constitutional rights in a plea agreement, but that such waivers must be "clear and unambiguous"). The Agreement does not even address the parties' right to self-service, much less a generator's right to self-supply station power under the Federal Power Act, and therefore could not possibly waive that right.

B. To the extent the Commission concludes that the Agreement restricts WPSC's right to self-serve the Facility, the MISO Tariff preempts the Agreement.

FERC has exclusive jurisdiction to regulate the interstate transmission and wholesale sale of electricity. *See* 16 U.S.C. § 824. FERC's jurisdiction over these areas is plenary. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986). To that end, the courts have recognized that state utility commissions must give binding effect to electric tariffs filed with or fixed by FERC. *Nantahala*, 476 U.S. at 962. This is known as the "filed rate" doctrine. The "classic application" of the filed rate doctrine involves instances in which FERC "authorizes a wholesale rate, but a state does not allow the buyer to pass that rate through in its state-jurisdictional retail rates." *Duke Energy Moss Landing, LLC v. Cal. Ind. System Operator, Corp.*, 134 FERC ¶ 61,151, P 25 (2011). However, the doctrine "is not limited to rates *per se*." *Nantahala*, 476 U.S. at 966. Rather, all of the terms of the filed tariff "are considered to be the law," and state or federal claims that attempt to challenge these terms are effectively barred. *Calif. ex. Rel. Lockyer v. Dynergy, Inc.*, 375 F.3d 831, 853 (9th Cir. 2004) (internal quotation marks and citation marks omitted).

Consistent with these principles, FERC has recognized that, when there is a conflict between federal and state tariff provisions regarding the provision of station power, "the federal tariff provisions must control." *Midwest Indep. Sys. Operator, Inc.*, 106 FERC ¶ 61,073, P 45 (2004). One case—with facts very similar to the current dispute—illustrates this point. *AES Warrior Run, Inc. v. Potomac Edison Co.*, 104 FERC ¶ 61,051 (2003). There, an independent generator, AES, had been purchasing station power from the local distribution utility, Allegheny Power. However, after taking service from Allegheny for about a year, AES procured station power from an affiliate directly over the interstate transmission network, without using Allegheny's distribution facilities.[2] However, Allegheny continued to levy a distribution charge against AES. *Id.* at PP 7–9.

AES complained to FERC and sought an order determining Allegheny's rates to be unjust and unreasonable due to the double recovery of delivery costs. FERC concluded that the distribution charges Allegheny levied against AES "would appear to be an impermissible double charge for transmission service." *Id.* at P 16. Because only transmission facilities were used in the delivery of the remotely self-supplied station power, FERC "would have jurisdiction over the delivery and the rates for the delivery" and any charge by Allegheny Power "would appear to be an impermissible double charge for transmission service." *Id.*[3]

Likewise, FERC has jurisdiction over WPSC's remote self-supply of station power to its Facility under the MISO Tariff. Even in the absence of remote self-supply, no KU distribution facilities are used to deliver station power to the Facility, and when WPSC

[2] We assume that AES operated in a retail access state.

[3] The provisional nature of FERC's decision is due to the fact that the commission was "express[ing] its views on the matters at issue" regarding stayed state court proceedings that AES initiated. *Id.* at P 18. FERC stopped short of ordering refunds of the double charges by the retail provider. After AES appealed to the D.C. Circuit Court of Appeals, the case was voluntarily remanded back to FERC, which ordered the refunds. *AES Warrior Run, Inc. v. Potomac Edison Co. d/b/a Allegheny Power,* 108 FERC ¶ 61,316 (2004).

commences remote self-supply of station power, it will not use KU distribution facilities to do so. The station power will be delivered exclusively over ATC's transmission system to which WPSC's Facility is directly interconnected. (*See* Stipulated Facts, at 2–3) FERC—not the Commission—will have jurisdiction over the delivery and the rates for the delivery.

KU attempts to avoid preemption by claiming that Schedule 20 of the MISO Tariff does not grant WPSC any rights but only "describes service options." (KU Initial Br., at 13) KU offers no citations or analysis for this claim, nor does it explain where else a generator in MISO would obtain authority to use ATC's MISO-operated transmission system to remote self-supply station power. KU's claim is easily dismissed by reference to the MISO Tariff. Section I states unequivocally that a "Generation Owner may arrange to provide for Station Power of a Facility" by remote self-supply. (*See* Petition, Exhibit 1, at 1) The generation owner must take transmission service to remote self-supply station power. This is made clear in Section III(1) of Schedule 20:

> In the event, and to the extent, that a Generation Owner obtains Station Power for its Facility through Remote Self-Supply during any Month, Generation Owner shall use and pay for hourly Non-Firm Point-To-Point Transmission Service for the transmission of Energy in an amount equal to the Facility's negative Net Output from Generation Owner's Facility(ies) having positive Net Output. (WPSC Petition, Exhibit 1, at 3)[4]

No additional source of law is required beyond the MISO Tariff to grant WPSC and other generators the right to remote self-supply station power over the transmission system. Under the filed rate doctrine, the provisions of the MISO tariff are law, and are therefore binding on this Commission. *See Nantahala*, 476 U.S. at 962; *Lockyer*, 375 F.3d at 853.

[4] By contrast, if the generation owner takes station power from a third-party supplier, Schedule 20 recognizes that the generation owner does not take any additional transmission service, other than that for which the third-party supplier charges the generation owner. *Id.*

Finally, KU's assertion that certain provisions of Schedule 20 demonstrate an intent to preserve the Commission's authority over the remote self-supply of station power over the transmission system is untenable. Section IV of Schedule 20 merely states that the tariff does not "supersede the otherwise applicable jurisdiction of a state regulatory commission." (*See* Petition, Exhibit 1, at 5) (emphasis added) This provision simply preserves state jurisdiction over retail rates when the generator is purchasing station power service from a retail provider. If this was not otherwise clear, Section IV is entitled "RETAIL PURCHASE OF STATION POWER."

In sum, federal law would preempt a Commission determination that the Agreement somehow overrides WPSC's right to self-serve under Wis. Stat. § 196.495(3). The FERC-approved MISO tariff grants WPSC the right to use the interstate transmission system to remote self-supply station power to its Facility. Under the filed rate doctrine, the MISO Tariff is federal law, is binding on the Commission, and preempts state law to the extent it would restrict WPSC's federal right to self-service over the interstate transmission system.

III. IF THE COMMISSION RULES IN WPSC'S FAVOR, ITS ORDER SHOULD TAKE EFFECT AS OF THE DATE THAT WPSC NOTIFIED KU THAT WPSC INTENDED TO SELF-SERVE THE FACILITY.

KU requests that, if the Commission rules in WPSC's favor, any order allowing WPSC to remote self-supply station power to the Facility should be held in abeyance until after KU's next rate case. (KU Initial Br., at 15) The Commission should reject this request. WPSC gave notice of its intent to self-supply almost a year ago. (Petition, at 2) Instead of moving forward with its decision immediately, WPSC attempted to negotiate a resolution with KU, and has agreed to resolve this dispute amicably by petitioning this Commission for a declaratory ruling. This delay has benefited KU and its customers at the expense of WPSC and its customers.

If the Commission rules that WPSC has the right to self-service, then this right should apply retroactively, from the date that WPSC notified KU that WPSC intended to remote self-supply station power to the Facility (July 1, 2013). KU should not be rewarded by delaying WPSC's relief until KU has modified its rates, especially since KU would not likely initiate its next ratemaking proceeding for another nine months.

CONCLUSION

For the foregoing reasons, WPSC respectfully requests that this Commission find that WPSC is entitled under Wis. Stat. § 196.495(3) and Schedule 20 of the MISO Tariff to self-supply station power to its Fox Energy Center in Wrightstown, Wisconsin.

Dated this 9th day of June, 2014.

Respectfully submitted,

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